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JOHN ZANDER,

Case No. DISM-03-0096

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

Respondent.

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair, and BUSSE NUTLEY, Member. The hearing was held in the Personnel Appeals Board Hearing Room, 2828 Capitol Boulevard, Olympia, Washington, on August 31 and September 1, 2004.

1.3 **Nature of Appeal.** This is an appeal from the disciplinary sanction of dismissal for neglect of duty, inefficiency, incompetence, and gross misconduct. Respondent alleges Appellant failed to fully review contract filings and concealed the fact the contracts were not fully reviewed when he indicated the work was complete.

II. FINDINGS OF FACT

2.1 Appellant John Zander was an Insurance Policy and Compliance Analyst 2 and permanent employee of Respondent Office of the Insurance Commissioner (OIC). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on October 23, 2003.

2.2 Appellant began working as an Insurance Policy and Compliance Analyst 2 in the Rates and Forms Division of the OIC in late 1999. The OIC is responsible for ensuring that insurance carriers are in compliance with state and federal laws prior to offering insurance services to consumers in the state of Washington. Appellant was responsible for reading and analyzing health insurance benefit contracts to ensure health carriers were in compliance with state and federal insurance laws. Appellant reviewed contract filings, documented violations, and communicated any findings to the insurance carrier. Appellant was also responsible for training Analyst 1's.

2.3 Appellant had the following history of informal corrective actions:

- On August 20, 2002, Appellant received a letter of reprimand for spreading untrue rumors about a co-worker and using state resources for personal use.
- On June 2, 2003, Appellant received a corrective action memo that identified several areas in his work performance where improvement was needed.
- On July 31, 2003, Appellant received a letter of reprimand for failing to provide accurate information about a Health Carrier to a market Conduct Examiner on June 26, 2003, and for giving misleading information to his supervisor regarding a Health Carrier.

2.4 Appellant, his supervisor, and other analysts working in the Rates and Forms Division developed an Analyst Worksheet (AWS) in 2000 as a tool to ensure all steps of the contract review process are completed and health plans meet all the legal requirements. Prior to the development of the AWS, analysts would sometimes perform a "spot check," also known as a site review, on contract filings. However, the practice of doing site reviews ceased with the implementation of the


analyst worksheet, which became a requirement for every full contract review. The only exceptions were short form filings or filings withdrawn by the carrier or returned to the carrier without being reviewed as authorized by the Deputy Commissioner.

2.5 In August 2002, Donna Dorris, Appellant's supervisor, conducted an annual performance evaluation for Appellant and began to notice problems with Appellant's performance. Ms. Dorris counseled Appellant on necessary improvements and advised him she would begin documenting his performance. In the subsequent months, Ms. Dorris continued to monitor Appellant's work. In addition, Ms. Dorris individually met with Appellant, as she did with all staff members, on a weekly basis to discuss contracts and complex health insurance issues.

2.6 In April 2003, Ms. Dorris observed several of Appellant's completed filings in a supply room waiting to be imaged into the computer system, the next step after a contract review is completed. Ms. Dorris became concerned when she discovered the filings completed by Appellant did not include the required Analyst Worksheet. Upon closer examination, Ms. Dorris realized Appellant had not been using the AWS for a lengthy period of time, which further prompted her to audit his work.

2.7 While reviewing a management report in August 2003, Ms. Dorris found an entry that made it appear as though Appellant read and processed an unusually high volume of work on one given day. Ms. Dorris consulted with her superiors and placed Appellant on home assignment pending review. Ms. Dorris audited Appellant's work performance for the period of January 2003 through May 2003, comparing the volume and quality of work processed. As part of the investigative process, Ms. Dorris directed two other analysts within the Rates and Forms Division to perform full contract reviews on a select number of Appellant's completed contracts. The results showed Appellant failed to fully review 167 contracts, and as a result, the contract filings contained multiple

1 errors, including the omission of several large sections within the contracts that Appellant did not
2 notice as missing. Results of the audit also showed Appellant would have had to read and process
3 over 6,000 pages of contract material over a three-day period. Despite Appellant's incomplete
4 work, he marked the contract filings as complete.

5
6 2.8 Appellant testified he performed a "spot check" or site review on contracts with the full
7 awareness of his  supervisor. Appellant also testified he did in fact read a large number of pages
8 over a three-day period in February 2003. Appellant argues he performed work that did not follow
9 agency policies but did so with the complete knowledge and direction of his supervisor.

10
11 2.9 The Analyst 1's in Appellant's division testified guidelines were clear about the requirement
12 to use the AWS and also testified an AWS was completed with every full contract review. The
13 other analysts further stated the typical process involved a close reading of contract filings while
14 comparing them to the AWS to ensure nothing was missed.

15
16 2.10 In reviewing the documents and testimony, a preponderance of credible evidence has
17 established Appellant was knowledgeable in agency procedures, helped develop the AWS as a
18 quality control measure, and trained other staff analysts. We find the department established the
19 AWS as a mandatory procedure that was to be strictly followed. We do not find Appellant was ever
20 advised to shortcut the process by either omitting the AWS or processing an unreasonable amount
21 of contracts in a short timeframe. Finally, we find it would be impossible to adequately read and
22 process over 6,000 pages in the short period of time Appellant acknowledged fully reviewing the
23 contract filings.

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25 2.11 Mr. Watson conducted a Loudermill meeting on September 17, 2003, and Appellant was
26 given an opportunity to address his deficiencies. Mr. Watson was not convinced by Appellant's

1 assertion that his supervisor instructed him to conduct reviews without the use of the AWS. Mr.
2 Watson concluded misconduct had occurred because of the potential harm to health carriers and
3 consumers as well as the repercussion to the agency. Mr. Watson did not believe Appellant's
4 behavior was a training issue and was concerned about Appellant's failure to accept responsibility
5 for his mistakes. In determining the level of discipline, Mr. Watson weighed the significant and
6 costly impacts on insurance carriers, consumers, and the department, and he determined dismissal
7 was the only appropriate sanction.

8
9 2.12 By letter dated October 7, 2003, Michael G. Watson, Chief Deputy Insurance Commissioner
10 and Appellant's appointing authority, notified Appellant of his dismissal effective October 22,
11 2003. Mr. Watson charged Appellant with neglect of duty, inefficiency, incompetence, and gross
12 misconduct for failing to properly and completely review insurance contracts during the time period
13 of January 1, 2003 through May 14, 2003. Mr. Watson further alleged Appellant indicated he had
14 done a full review of the contracts by entering the appropriate code in the agency's computer
15 tracking system and initialing paper copies of the contract filings.

16 17 18 **III. ARGUMENTS OF THE PARTIES**

19 3.1 Respondent argues Appellant was an experienced insurance analyst who trained other staff
20 on policies and procedures yet failed to follow procedures he helped to implement. Respondent
21 asserts a review of Appellant's work revealed multiple errors that were unacceptable for someone in
22 a professional level position. Respondent argues analysts use the AWS as a safeguard to ensure
23 company compliance with the law and argues the insurance industry relied on Appellant's expertise
24 and accuracy to know laws were appropriately followed. Respondent argues Appellant's actions
25 seriously impacted insurance carriers, consumers, as well as the agency. Respondent contends
26

1 Appellant failed to be accountable and instead blamed his supervisor for his mistakes. Respondent
2 argues Appellant's failure to take responsibility left them no alternative than dismissal.

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4 3.2 Appellant argues his supervisor should have been aware of performance deficiencies long
5 before the period in question because she addressed performance measures and goals weekly.
6 Appellant further argues his supervisor should have provided guidance to help him meet department
7 expectations. Appellant contends none of his performance evaluations note any problems with his
8 work, so he was unaware that he was not meeting standards and was not given an opportunity to
9 improve his work. Appellant contends other employees also routinely performed contract reviews
10 without strict use of the AWS. Appellant contends large volumes of work often consisted of
11 reviewing repetitive and familiar language, which made it possible to sometimes expedite the
12 review. Appellant asserts that after March 27, 2003, he reviewed all contracts using an Analyst
13 Worksheet.

14 IV. CONCLUSIONS OF LAW

15 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
16 herein.

17
18 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
19 the charges upon which the action was initiated by proving by a preponderance of the credible
20 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
21 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
22 Corrections, PAB No. D82-084 (1983).

1 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
2 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
3 of Social & Health Services, PAB No. D86-119 (1987).

4
5 4.4 Inefficiency is a failure to produce the desired effect with the minimum of energy and time.
6 Droege v. Dep't of Information Services, PAB No. D88-024 (Littlemore, Hrg. Exam.), aff'd by
7 Board (1988).

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9 4.5 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
10 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

11
12 4.6 Appellant was aware of the requirement and purpose of the AWS for each full contract
13 review. Respondent has met its burden of proving Appellant neglected his duty, was inefficient,
14 and committed gross misconduct when he failed to fully review 167 contracts and falsely
15 represented them as complete. As a result, Respondent has proven Appellant's performance
16 deficiencies had the potential for causing legal and financial harm to the department and were
17 contrary to its mission. In addition, the large omissions in the contracts reviewed and signed off on
18 by Appellant were unacceptable for an analyst with his expertise and further proved his negligence
19 in performing his duties.

20
21 4.7 Incompetence presumes a lack of ability, capacity, means, or qualification to perform a
22 given duty. Plaisance v. Dep't of Social and Health Services, PAB No. D86-75 (Kent, Hrg. Exam.),
23 aff'd by Board (1987).

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25 4.8 Respondent has failed to prove incompetence because Appellant understood the duties of his
26 position.

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4.9 Under the totality of the proven facts and circumstances, dismissal is appropriate and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of John Zander is denied.

DATED this _____ day of _____, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Gerald L. Morgen, Vice Chair

Busse Nutley, Member